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Supreme Court, U.S.
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No. 99-1745

In The

Supreme Court of the United States

AMERICAN AIRLINES, INC.,

Petitioner,

v.

THE UNITED STATES
DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Airline Deregulation Act's preservation of the "proprietary powers and rights" of local governments owning airports permits local government authorities in the same metropolitan area to regionally plan among themselves for a modern, regional airport that accommodates all types of commercial passenger traffic into the metropolitan area and then to limit further smaller airports to general aviation reliever air service?

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INTEREST OF *AMICUS CURIAE*

The Arapahoe County Public Airport Authority ("ACPAA")[1] owns and operates Centennial Airport ("Centennial") which is the second busiest general aviation reliever airport in the United States. As part of its creation as a county airport[2] in 1966 the Arapahoe County Commissioners publicly promised the county taxpayers that Centennial[3] would serve as a general aviation reliever airport for Stapleton International Airport[4] ("Stapleton International") and Centennial would never serve scheduled passenger service. Consistent with regional and national planning, as well as its design and construction, Centennial has served for 33 years as a general aviation reliever airport.

Centennial's role as a general aviation reliever airport was affirmed by the Colorado Supreme Court in *Arapahoe County Public Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P. 2d 587 (Colo. 1998). Rejecting an air

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[1] Counsel for a party did not author this brief, in whole or in part. The monetary contribution for the preparation and submission of this brief is paid by the Board of Commissioners of Arapahoe County, Colorado. Three Arapahoe County Commissioners sit on the five member ACPAA Board of Commissioners.

[2] ACPAA became a political subdivision of the state of Colorado in 1975 and assumed ownership and operation of Centennial.

[3] Centennial was originally known as the Arapahoe County Airport.

[4] Stapleton International was closed in 1995 and replaced by Denver International Airport ("DIA").

carrier's challenge to ACPAA's ban on scheduled passenger service, the Colorado Supreme Court held that the ban falls squarely within the proprietary powers exception, 49 U.S.C. §41713(b)(3). *Id.* at 595-96.

Approximately four (4) months after the Colorado Supreme Court decision, and more than five (5) years after ACPAA had contacted the United States Department of Transportation ("DOT") about its position on scheduled passenger service, the Federal Aviation Administration ("FAA") ruled on three administrative complaints that had been filed against ACPAA, which complaints were pending at the time of the Colorado Supreme Court's decision[5]. The FAA declared that ACPAA did not have the proprietary power to ban scheduled service and, consequently, stripped ACPAA of its eligibility for discretionary federal grant agreements.[6]

The decision of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"), which is at issue here, declined to follow and distinguished the Colorado

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[5] Two of the complaints had been filed by the air carrier. The first one had been filed in January 1995, following the state trial court's granting of the Permanent Injunction Order. The second one was filed in February 1998, following oral argument before the Colorado Supreme Court. Finally, a complaint had been filed by a shareholder of the air carrier in August 1994.

[6] The Final Agency Decision and Order was ultimately entered on February 18, 1999. It is the subject of a Petition for Review filed by ACPAA now pending before the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit"). See *Arapahoe County Public Airport Auth. v. Federal Aviation Administration, et al.*, No. 99-9508. Oral Argument was held on March 6, 2000.

Supreme Court decision. The Petition for a Writ of Certiorari ("Petition") states: "The single important issue presented . . . is whether the Airline Deregulation Act (the 'ADA') preempts the authority of local governments to implement regional plans that allocate particular types of air traffic to specific airports." *Id.* at 3. The resolution of this issue in favor of ACPAA was one of the major bases for the Colorado Supreme Court decision upholding the ban on scheduled passenger service at Centennial. See *Arapahoe County Public Airport Auth.*, 956 P. 2d at 589-91, 594, 596-97. Because of the history of Centennial's planning and design, ACPAA wishes to address this proprietary power issue. It is an issue which ACPAA submits is absolutely crucial, not only to Centennial and Dallas-Fort Worth International Airport, but also to the national aviation system.

REASONS FOR GRANTING THE PETITION

This Court has never addressed "what limits, if any, apply to a municipality as a proprietor." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635-36 n. 14 (1973). As noted by the Colorado Supreme Court, the lower federal courts have addressed the proprietary powers exception in two general areas – noise and perimeter rules. See *Arapahoe County Public Airport Auth.*, 956 P. 2d at 595. Consistent with the decision in *Western Air Lines, Inc. v. Port Auth. of New York & New Jersey*, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F. 2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), the Colorado Supreme Court upheld the ban on scheduled passenger service as a valid exercise of ACPAA's proprietary

powers. *Arapahoe County Public Airport Auth.*, 956 P. 2d at 594-96. As asserted by Petitioner, the Fifth Circuit decision directly conflicts with the *Western Air Lines, Inc.* and *Arapahoe County Public Airport Auth.* decisions. Granting the Petition would provide this Court with the opportunity for its first interpretation of 49 U.S.C. §41713(b)(3). Granting the Petition would also provide guidance and direction, not only to all state and federal lower courts, but also to the DOT and FAA which, as noted by Petitioner, are acting inconsistently on the issues of proprietary powers and regional planning. See Petition at 16-17.

I. The History of Centennial's Planning and Design Supports the Granting of the Petition.

In declining to follow *Arapahoe County Public Airport Auth.*, the Fifth Circuit states:

> To the extent that *Arapahoe* holds that it is within an airport owner's proprietary powers to restrict service at a local airport without articulating a viable purpose for the restriction, we view that case as deviating from the generally accepted rule that we adopt here. In *Arapahoe*, the Colorado Supreme Court – without finding any purpose for the restriction beyond the proprietor's bald assertion that it would 'strip' the airport Authority 'of its ability and authority to manage the Airport', see *id.* at 591 – upheld a municipal proprietor's ban on all passenger service at Centennial Airport, see *id.* at 595.

American Airlines, Inc. v. Department of Transportation, 202 F. 3d 788, 807 (5th Cir. 2000).

ACPAA submits that the Colorado Supreme Court did articulate several viable purposes for the ban, one of which is at issue here – regional planning. A review of the facts before the Colorado Supreme Court demonstrate the relevance and importance of regional planning.

Centennial first opened in 1967. At the time, Stapleton International was experiencing problems with general aviation congestion and Centennial was built for the express purpose of relieving Stapleton International from general aviation activities so that Stapleton International could function as the scheduled passenger airport for the Denver metropolitan area.

Controversy surrounded the creation of Centennial. The Arapahoe County Commissioners promised the public that Centennial would be general aviation only, and would not permit scheduled passenger service. In 1975 the County Commissioners created ACPAA which is a political subdivision of the State of Colorado. The Commissioners, whether County or ACPAA, have never knowingly permitted scheduled passenger service at Centennial.

On May 7, 1993 Centennial Express Airlines, Inc. ("CEA") filed an Application to Conduct Scheduled Passenger Service at Centennial. The Application proposed to operate 30-seat aircraft directly to eight cities, six scheduled flights per day. This proposed operation, at a sixty (60%) percent load factor, would result in approximately 630,000 passengers a year at Centennial.[7]

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[7] Subsequent to the Colorado Supreme Court ruling and during the FAA hearings held on November 12, 1998, CEA

On July 21, 1993, ACPAA and Arapahoe County wrote to DOT ("1993 letter"). The 1993 letter with supporting materials, addressed why Centennial, a general aviation reliever airport, should not be required to accept or approve applications for scheduled passenger service. The 1993 letter sets forth the history of Centennial's planning as a general aviation reliever airport.

1. By letter dated February 1, 1963, the Public Utilities Commission of the State of Colorado set forth certain facts and opinions in support of the establishment of a new airport to be located southeast of Denver to serve general aviation and to relieve congestion being experienced at Stapleton International. The letter specifically stated: "The suggested general aviation airport would serve all types of civil aircraft, other than scheduled air carriers. . . . "

2. On February 16, 1965, by Resolution, it was recited that Arapahoe County had accepted an offer from the United States government to fund preparation of planning documents for a general aviation airport.

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acknowledged that the May 1993 application would have resulted in 96 scheduled passenger flights a day into and out of Centennial or 2,880 passengers daily, and in one calendar year 1,051,200 passengers. With a 60% load factor there would be 630,000 passengers per year. Further, CEA had discussed a proposal with the FAA to link 10 similar operations together at Centennial and claimed that FAA approved this concept. ACPAA notes that this concept could have resulted in a potential 6.3 million passengers a year out of an airport that has no on-the-airport fire and rescue, no terminal, no baggage system, no adequate parking, and no adequate security.

3. On February 8, 1966 the Arapahoe County Planning Commission adopted a Resolution in support of the construction of a general aviation airport.

4. On March 14, 1966 the crowded conditions at Stapleton International were reported in a newspaper article. On March 30, 1966 a public meeting was held concerning the proposed construction of the Arapahoe County Airport. Newspaper coverage of this event reported that the Arapahoe County Planning Director stated that the airport would serve general aviation and not scheduled carriers, and a representative from the FAA, in the audience at this meeting, was purported to say that the new airport should relieve congestion at Stapleton International.

5. In 1966, by Resolution, the Chairman of the Board of Arapahoe County was authorized to sign a Request for Aid – Federal Aid Airport Program, for the fiscal year beginning July 1, 1966.

6. On May 13, 1966 a local newspaper carried the response of the Chairman of the Board to a homeowner's association opposing the proposed airport, that a further justification for the airport was to act as a general aviation reliever airport for a crowded Stapleton International.

7. Dedication ceremonies for the Arapahoe County Airport were held on May 12, 1968. It was reported in the newspaper that the FAA area director was delighted that the new airport had been built and FAA regards Arapahoe County Airport as "a much-needed reliever terminal for general aviation".

8. On October 21, 1981, ACPAA approved an Environmental Assessment and Airport Master Plan Study ("Master Plan") for the airport. Presentations of the Master Plan were made to local governmental entities and other organizations. In addition, a public hearing was held. The Master Plan was approved by the FAA by letter dated October 28, 1981, in which letter it was stated that the Master Plan complies with "the conditions of the grant agreement" and that the Master Plan "should be furnished to all local governmental agencies having an interest in airport development".

The Master Plan described the Arapahoe County Airport as a designated general aviation reliever for Stapleton International and "in the National Airport System Plan as a General Aviation (G/A) reliever with a Basic Transport functional role" and that no "scheduled air carrier or commuter airlines serve the airport although air taxi and charter service is available through fixed based operators". In reference to Stapleton International, the Master Plan stated that it was "the only air carrier airport in the Denver Metropolitan Region . . . " The Master Plan stated that the National Airport System Plan envisions no change in the airport operational role over the 20 year period of the Master Plan. It also stated that the "airport is expected to remain the primary general aviation reliever in the Denver Metropolitan Region during the next 20 years . . . "

The Environmental Assessment was approved by FAA on June 17, 1982. In the Environmental Assessment, the Arapahoe County Airport was described as a general aviation airport and a reliever airport for Stapleton International:

> The proposed action will not change the designation or role of Arapahoe County Airport within the National, Regional, State, or Local Airport system. The airport will remain a Basic Transport airport, serving general aviation with a role as a reliever for Stapleton International.

The Master Plan also contained the Airport Layout Plan. The Layout Plan showed future construction of two new east-west runways. In order to build these runways, additional land had to be acquired. In 1982 and in 1983 grants were issued by the FAA for land acquisition for these proposed east-west runways. By letter dated June 26, 1986 the FAA solicited support from ACPAA to surrender these grants, and in the letter it was stated:

> Should you decide to abandon plans for the runway, it will be necessary that you rethink the future role of the airport. For example, if capacity is constrained, it may be desirable (as was done at Stapleton) to discourage use of the airport by certain types of operations. There would also be need to rethink optimum use of existing airport lands and to perhaps dispose of lands no longer needed for airport purposes. These similar matters could be the focus of a revised Airport Master Plan Update.

On February 9, 1987 ACPAA and Arapahoe County entered into a cancellation Agreement. By Resolution, ACPAA approved a revised Airport Layout Plan which eliminated the two proposed east-west runways and proposed the extension of the existing east-west runway. In April 1992, ACPAA approved a second revised Airport Layout Plan which reduced the proposed extension of the existing east-west runway.

9. The 1993 letter also addressed regional planning through the Denver Regional Council of Governments ("DRCOG"). DRCOG is a voluntary association of 44 county and municipal governments that work together on regional planning issues. DRCOG develops and maintains a regional aviation system plan "to ensure that overall general aviation planning is integrated with comprehensive regional and local goals, policies and planning."

In 1989 DRCOG published the *2010 Regional Aviation System Plan* ("2010 Plan"). The preparation of the 2010 Plan was financed in part through a continuing aviation system grant from the FAA. The 2010 Plan designated Centennial "as a non-commercial passenger, transport-category, general aviation reliever airport". The 2010 Plan discussed the capacity constraints at Stapleton International and the necessity for a new air carrier airport to be in operation by the mid-1990's in order to meet future projections.

In December 1991, DRCOG published the *Regional Aviation System Planning Program Data File*. The preparation of this document was financed in part through a continuing aviation system planning grant from the FAA. In this document Centennial "is categorized as a non-commercial passenger, transport category, G.A. reliever". The document also stated: "Stapleton International Airport is the only airport in the region serving certified airlines and providing short and long-haul scheduled passenger and cargo service."

10. The *FAA Aviation Forecasts* published October 1990 by the Forecast Branch, Office of Aviation Policy and

Plans of the FAA, contains forecasts of aviation activity in the Denver-Boulder "Hub". In this publication, Centennial is described as a reliever airport for Stapleton International and reliever airports are defined as: "metropolitan area general aviation airports which serve to reduce air carrier airport congestion by providing facilities and service suitable for attracting and diverting general aviation activity away from major air carrier airports." The publication describes Stapleton International as the designated air carrier airport in the Denver region. It is also stated in this document that:

> The Denver Stapleton airport facility is scheduled to close in late 1993 in conjunction with the opening of the new Denver International Airport ('DVX') in Adams County. It is expected that most of the GA activity and based aircraft now operating at DEN will move to the Front Range, Centennial, or Jefferson County airports. It is expected that the new airport will have only limited facilities available for the handling of GA aircraft (i.e., no Fixed Base Operator) and that GA activity destined for DVX will be encouraged to utilize the facilities of other reliever airports in the Denver CMSA.

11. On March 4, 1991, the Secretary of Transportation submitted to the United States Senate and the House of Representatives the National Plan of Integrated Airport Systems ("NPIAS") 1990 – 1999, as required by § 504(a) of the Airport and Airway Improvement Act of 1982. The NPIAS sets forth state summaries and individual airport data. Under primary and commercial service systems for Colorado, Denver new and Denver Stapleton

International are listed with their reliever airports, Centennial, Jeffco, Front Range, and new. Under reliever and general aviation system for Colorado, Centennial is listed for the years 1990-1994, and for the years 1995-1999 as a Reliever Airport, Transport Type.

ACPAA did not receive a response to its 1993 letter for seventeen months.

In the interim, on April 8, 1994, CEA filed with ACPAA an amended application. This application sets forth a proposed operation for 30-seat aircraft to five major cities with seventeen departures per day.

On August 7, 1994, a shareholder of CEA filed a complaint with the FAA against ACPAA. The shareholder complained about ACPAA actions dating from 1985, which actions denied access to scheduled passenger service, and also that such actions violated ACPAA's grant agreements with the FAA.

On September 8, 1994, ACPAA adopted, revised and restated Minimum Standards for Commercial Aeronautical Activities ("Minimum Standards").[8] These Minimum Standards define Centennial's "Airport Purpose" as:

> any Authority action, undertaking or development that is consistent in maintaining the non-certificated status of the Airport and in preserving the Airport funding category as a 'Reliever Airport' serving general aviation users. Under no circumstances shall the Airport Purpose include scheduled passenger services.

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[8] ACPAA first adopted Minimum Standards on February 5, 1981.

On December 20, 1994, CEA, in violation of the Minimum Standards, initiated scheduled passenger service between Centennial and Dalhart, Texas. ACPAA filed suit against the airline and obtained a Temporary Restraining Order on December 22, 1994.

On December 23, 1994, ACPAA finally received a letter from the DOT in response to the 1993 letter ("DOT letter"). The DOT letter noted the filing of the shareholder's complaint in August 1994 and the understanding that the FAA was docketing the complaint. The DOT letter noted that CEA had commenced scheduled passenger service over ACPAA's objections. The DOT letter also noted: "In addressing similar cases in the past, FAA has found it arbitrary to exclude any particular class of service due to factors that are not reasonably related to the impacts of that service." The DOT letter then addressed the 1993 letter, the materials submitted, and ACPAA's obligations under its grant agreements. The DOT letter continued by stating:

> Although the material that you submitted states that approval of scheduled service would increase the number of operations and passengers at Centennial Airport, there was insufficient information submitted with your letter to demonstrate that a restriction of any particular category of operation could be adequately supported. For example, although individual factors are not alone likely to be dispositive, your letter does not discuss the nature and extent of any resulting environmental impact, congestion, or effect on airport facilities such as the terminal or parking, that would result from the initiation of scheduled service. . . .

Permanent injunction hearings were held on January 3, 5 and 6, 1995. Among the witnesses testifying was Mr. Isbill, the airport engineer responsible for the design, engineering and coordination of the construction of Centennial. Mr. Isbill testified that from the beginning in 1965 or 1966 until the hearing in January 1995, there had not been any design consideration for scheduled air carriers or the impact they may have on the airport or the facilities they may require. The design was for general aviation operations. This witness also testified that if a commercial service airport was designed, there would be several differences in the ground site design. He "would have planned a terminal area and set aside auto parking, auto access lighting, and some type of security." The witness also identified the design concerning baggage and ticketing facilities, and the absence of all of these previously described elements from Centennial.[9] Finally,

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[9] Jim Dunlap, Deputy Director of Aviation/Operations for DIA testified at the November 1998 FAA Hearings. There are 108 daily departures from DIA from four airlines that provide the same type of service that was proposed by CEA at Centennial. For these operations DIA provides concourse parking, jetways (in some cases), security screening for the passengers and the entire realm of support from snow removal and maintenance to ground transportation services and parking. Also, DIA would not allow these 108 daily departures without a passenger terminal, without a baggage system, without a ticketing system, without adequate parking and without security personnel. Further, Mr. Dunlap testified that airport rescue and firefighting is important to the safe operation of the airport because if a piece of equipment isn't at the site within 3 minutes with dry chemical or foam, the chances are that the aircraft is already in flames and it is too late to rescue the passengers.

the witness testified that the present annual capacity of Centennial Airport is 525,000 operations.[10]

Allowing one scheduled passenger operation at Centennial would require ACPAA to allow any other qualified commercial air carrier to commence operations. The Colorado Supreme Court recognized this legal principle and stated:

> Centennial Express has ambitions to become much larger. Opening Centennial's doors to Centennial Express would also require the Authority to make Centennial available to other airlines who wish to provide scheduled passenger service. *See* 49 U.S.C. §47107(a)(4) (1994)

Arapahoe County Public Airport Auth., 956 P. 2d at 596.

James DeLong, the Director of Aviation at DIA, testified at the District Court injunction hearing as follows:

> Hobby was originally the air carrier airport until 1969, when the City of Houston built a new Houston Intercontinental facility. From 1969 until the mid-'70's, it was a pure general aviation reliever airport, and it was always the intent of the community that all air carrier activity occur at the other facility. In the mid-'70's, a small airline by the name of Southwest thought it might be appropriate to try one airplane flying to and from Dallas and Hobby airport. I think they either had one or two flights a day, but don't quote me on that because it predated

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[10] In 1998 total operations at Centennial were 466,267. In 1999 total operations were 436,081. In 2000 projected operations are 474,000.

> me by about three years. No one noticed it initially. I was the airport manager in 1979 at Hobby and responsible for it until about 1987. In 1989, there were about 4 million passengers going through Hobby, because once Southwest got a toehold, every other airline that served Houston had to go into that market simply because the competitive advantage of that airport being so close to the center of the city was such that they had no choice, and I understand in 1993, I think they processed over 9 million passengers through Hobby airport.

On January 10, 1995 ACPAA obtained a Permanent Injunction Order against the Airline. The trial court found that: (1) Centennial is approaching its capacity; (2) current FAA policy would allow a general aviation reliever airport such as Centennial to ban scheduled passenger service if Centennial was in a multi-airport system under one owner; (3) local, regional and national planning has designated Centennial as a general aviation reliever airport in a multi-airport system; and (4) such planning is consistent with and the functional equivalent to the FAA's policy that allows multi-airport proprietors to ban scheduled passenger service at a general aviation reliever airport in order to maintain the attractiveness of the general aviation reliever airport to general aviation.

The Permanent Injunction Order also states that Centennial is not designed to accommodate scheduled passenger service. If scheduled passenger service had been intended, Centennial would have been designed with a terminal, baggage system, adequate security and adequate parking.

On April 9, 1998, four days before the Colorado Supreme Court ruling, and in what ACPAA considers a related matter, ACPAA adopted a Resolution containing an additional basis for the ban on scheduled passenger service. This Resolution arose out of an application for a public charter operation which ACPAA determined to be a scheduled passenger service operation. This additional basis is the National Transportation Safety Board's ("NTSB") recommendation that scheduled passenger service be permitted only at airports certificated pursuant to 14 C.F.R. Part 139. Centennial is not certificated pursuant to 14 C.F.R. Part 139. Centennial does not have on-the-airport fire and rescue capabilities.

On April 13, 1998, the Colorado Supreme Court issued its opinion in *Arapahoe County Public Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P. 2d 587 (Colo. 1998).

On August 21, 1998, notwithstanding the planning, funding and design of Centennial for over 30 years as a general aviation reliever airport, the existence of administrative complaints against ACPAA since 1994, and the FAA's contemporaneous knowledge of the state court litigation from inception to conclusion, the FAA determined that ACPAA could not ban scheduled passenger service. ACPAA was stripped of its eligibility to apply for discretionary federal grant agreements. ACPAA appealed the decision.[11]

At the FAA hearings, ACPAA's Commissioner witness testified that there were no plans by ACPAA to make

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[11] See footnote 6, *supra*.

any design changes to Centennial with respect to a passenger terminal, adequate parking, adequate security or a baggage system. Further, there were no plans by ACPAA to change Centennial's role as designated in DRCOG's regional planning. He also testified that the previous Board denied regularly scheduled passenger service and the current Board continues to do so. There is no ability, either from an infrastructure or financial perspective, to do other than ban regularly scheduled passenger service. With respect to the proposed volume of scheduled passenger service as set forth in CEA's May 1993 application, it would be devastating to the character of Centennial.

CONCLUSION

ACPAA accepts the consequences of maintaining its role as a general aviation reliever airport – there will be no future federal funding. ACPAA, however, agrees with and supports the Petitioner. If use restrictions, around which restrictions an airport is planned, funded and designed, can be invalidated years later, local governments and their populace will be reluctant to support the construction of new airports. When the FAA retroactively ignores its statutory mandate set forth in 49 U.S.C. §40101(8) and 49 U.S.C. §47101(g), to coordinate with local and regional planning, the FAA, and not the local

owner and operator, constitutes the greater obstacle to a continued, viable national aviation system.

Respectfully submitted,

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